Supreme Court, U.S.
FILED
OCT 9 1971
E. ROBERT SEAVER, CLERK

LIBRARY
SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-518

GEORGIA COUCH, ADMINISTRATRIX OF THE ESTATE OF OTIS O. COUCH, DECEASED,
Petitioner,

vs.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

R. KAY MATTHEWS
Atoka, Oklahoma 74525

JAMES E. DRISCOLL
Seminole, Oklahoma 74868

PAYNE RATNER
444 N. Market
P. O. Box 306
Wichita, Kansas 67201
Counsel for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

TABLE OF CONTENTS

Citation to Opinion Below 2

Jurisdiction 2

Questions Presented 2

Statutory Provisions Involved 3

Statement of Case 3

Reasons for Granting the Writ 6

Argument and Authorities—

1. In Deciding This Case under the Federal Employers Liability Act, the State Court Has Erroneously Applied the Standard of Proof Necessary to Support Recovery in a Common Law Negligence Action 7

2. The Court Has Sub Silento Applied the Common Law Doctrine of Assumption of Risk to Defeat Recovery on Behalf of the Deceased Employee 10

3. The Court Has Failed to Consider All of the Circumstantial Evidence Supporting the Employee's Cause of Action under the Federal Employers Liability Act 11

Conclusion 13

Certificate of Service 13

Appendix A—Opinion and Judgment of the Supreme Court of Oklahoma A1

Appendix B—Order Issuing Mandate but Staying Enforcement Thereof A16

Appendix C—45 U.S.C.A. § 51 ..... A17

Appendix D—45 U.S.C.A. § 54 ..... A18

Table of Authorities

CASES

Gulf, Colorado & Santa Fe Railway Co. v. *Waterhouse*, 223 S.W.2d 654 (1949) 8-9, 10
Harris v. *Pennsylvania Railroad Co.*, 361 U.S. 15, 80 S.Ct. 22, 4 L.Ed.2d 1 6
Hendricks, Administratrix v. *Southern Pacific*, 339 P.2d 731 (Ariz.), cert. granted 361 U.S. 879, 80 S.Ct. 210, 4 L.Ed.2d 155 7
Kansas City Southern Railway v. *Norwood*, 367 P.2d 722 (Okla.) 11
Missouri-Kansas-Texas Railway Co. v. *Hearson*, 422 F.2d 1037 (10 Cir. 1970) 8
Rogers v. *Missouri Pacific Railroad Co.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 ..... 7, 8, 9, 11
Shenker v. *Baltimore & Ohio R.R. Co.*, 374 U.S. 11, 83 S.Ct. 1667 (1963) 8
Stone v. *N.Y. Central, C. & St.L. R. Co.*, 344 U.S. 407, 73 S.Ct. 358, 97 L.Ed. 669 9
Tiller v. *Atlantic Coast Line Railroad Co.*, 318 U.S. 54, 63 S.Ct. 444, 87 L.Ed. 610 10
Urie v. *Thompson*, 337 U.S. 163, 69 S.Ct. 1018 8
Wilkerson v. *McCarthy*, 336 U.S. 53, 69 S.Ct. 413, 93 L.Ed. 497 6

STATUTES

Federal Employers Liability Act (Title 45, U.S.C.A. Sec. 51 et seq.) 1, 6
Section 51 3
Section 54 3

OTHER AUTHORITY

Address to American Bar Association, July 5, 1971, by Hon. Warren E. Burger, Chief Justice of the United States 6
36 A.L.R.2d, p. 107 11

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. .....

GEORGIA COUCH, ADMINISTRATRIX OF THE ESTATE OF OTIS O. COUCH, DECEASED,
Petitioner,

vs.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

Petitioner respectfully prays that a writ of certiorari be issued to review the judgment of the Supreme Court of the State of Oklahoma in reversing a jury verdict for the petitioner and entering judgment for respondent railroad in an action filed under the Federal Employers Liability Act, Title 45, U.S.C.A. Sec. 51, et seq.

CITATION TO OPINION BELOW

The opinion and judgment of the Supreme Court of the State of Oklahoma is reported in ..... Okla. P.2d ....., and is set out in Appendix A, p. A1. The court's order denying rehearing is contained in Appendix B, p. A16.

JURISDICTION

The judgment of the Supreme Court of the State of Oklahoma was entered on July 13, 1971. Petitioner's petition for rehearing was denied on August 4, 1971. Petitioner's motion to stay the court's mandate was sustained granting petitioner until November 1, 1971, to file a petition for certiorari with this court. The jurisdiction of this court is invoked under the provisions of Title 28, U.S.C.A. §1257(3).

QUESTIONS PRESENTED

1.

Whether in deciding this case under the Federal Employers Liability Act the Supreme Court for the State of Oklahoma has erroneously applied the standard of proof necessary to support recovery in a common law negligence action.

2.

Whether the lower court has sub silento applied the common law doctrine of assumption of risk to defeat recovery on behalf of the employee's widow and administratrix.

3.

Whether the lower court properly considered all of the circumstantial evidence supporting the deceased employee's cause of action under the Federal Employers Liability Act.

STATUTORY PROVISIONS INVOLVED

The applicable statutory provisions involved are as follows: Title 45, U.S.C.A. Sec. 51, Appendix C, p. A17, Title 45, U.S.C.A. Sec. 54, Appendix D, p. A18.

STATEMENT OF CASE

Plaintiff Georgia Couch, administratrix and surviving spouse of Otis O. Couch, deceased, alleged in her petition that Otis O. Couch was employed by defendant as an assistant roadmaster. (C-M 4) On August 5, 1963, at about 2:00 p.m., while so employed, decedent met his death while working upon defendant's right-of-way at a point one and one-half miles southwest of Cushing, Oklahoma. (C-M 5) At the aforementioned time and place, plaintiff's decedent was working alone, cutting trees along defendant's right-of-way, using a brush axe as directed. The temperature at the time was 97 degrees. There were no eye witnesses who could testify as to the exact circumstances of Mr. Couch's death. When the decedent's body was found at approximately 7:00 p.m. on the above date, the body was on its knees, slumped over, with the head lying on the stumps of some trees which had been cut. (C-M 138) There was a sharp instrument identified as an axe located under Couch's body. (C-M 142) The deceased had been observed earlier in the day cutting trees in the vicinity where deceased's body was found. (C-M 147) Plaintiff

contended that Couch's death was a direct result of extraordinary exertion, heat and exhaustion, which produced heart failure and pulmonary edema.

Plaintiff's petition further states that the defendant, commencing in 1955, adopted a policy of drastic reduction of its labor force assigned the duties of repair and maintenance of defendant's system tracks and right-of-way, which totaled 3,241.35 miles. As a result of this policy, defendant reduced its maintenance of way labor force for its entire system from a total of 1,088 workmen in 1955 to 111 in 1963. (C-M 8) Exhibits 10 through 19. (C-M 132)

At the time of his death, deceased had been assigned to patrol 107.9 miles of defendant's track from Hominy, Oklahoma, to Oklahoma City, Oklahoma. (C-M 86) To assist decedent in covering the above territory, defendant supplied a labor force consisting of three foremen and five laborers and an extra gang consisting of one foreman and five laborers. (C-M 296) In contrast to the foregoing number of workmen, the defendant prior to 1956 had assigned a total of 28 foremen and laborers to repair and maintain the same section of track. (C-M 179)

Plaintiff charged the defendant with the following acts of negligence (C-M 102):

1. Failure to provide a reasonably safe place in which to work.

2. Failure to provide a reasonably safe method to do this work.

3. Failure to provide a sufficient number of competent employees by which to do the assigned work.

At the time of his death, the deceased was earning $6,780.00 annually. Deceased was 39 years of age and had a life expectancy of 33.07 years according to the Commis-

sioner's 1958 Standard Ordinary Table of Mortality. Georgia Couch was likewise 39 years of age and had a similar life expectancy. By reason of deceased's untimely death, plaintiff alleged damages totaling $224,214.60. (C-M 10)

Defendant's initial answer consisted of a general denial of negligence, together with affirmative defenses of sole proximate cause and contributory negligence. (C-M 67)

Defendant's amended answer (C-M 97) alleged, in addition to a general denial and sole proximate cause, specific acts of contributory negligence as follows:

> "1. . . . that he was peculiarly aware of the conditions then existing in the locale immediately prior to his death and was peculiarly aware of his physical condition and ability to perform said task under said conditions . . . That if the deceased expired as a result of heat exhaustion or heat stroke such expiration resulted from his failure to utilize that knowledge he had of the climatic conditions . . . together with that knowledge of his physical ability to perform such tasks under such conditions.
>
> "2. That Otis O. Couch on December 16, 1961, suffered coronary insufficiency . . . and had been told to see a physician of his choice . . . that he failed to follow such recommended procedure but instead returned to his duties—deceased's failure to act upon the knowledge he had was the sole proximate cause of his death."

The court struck paragraphs II(1) and II(2) on grounds that such allegations were improper under the Federal Employers Liability Act. This order did not affect the defendant's plea of contributory negligence. (C-M 436) During the course of the trial, the defendant withdrew and abandoned the specific charge of negligence contained in

paragraph II(2), summarized above. (C-M 350) Following defendant's announcement, plaintiff's counsel dictated an oral reply into the record denying that Otis O. Couch was guilty of contributory negligence.

The trial judge then submitted the case to the jury on the issues outlined herein. The jury returned a verdict on April 19, 1967, in the amount of $60,000.00. (C-M 432) On April 25, 1967, defendant filed its motion for new trial (C-M 433) which was overruled on May 9, 1967.

The court will note from the record that the Supreme Court of Oklahoma required approximately 2 years and 10 months to render an opinion in this case involving the application of federal law. As the Chief Justice of this court has so aptly stated:

> "The public is tired of the spectacle of appeals that lag for years. . . There must be finality at some point."
>
> "The State of the Federal Judiciary" an address to the American Bar Association, July 5, 1971, by the Hon. Warren E. Burger, Chief Justice of the United States.

REASONS FOR GRANTING THE WRIT

Historically this court has exercised judicial supervision and stewardship over actions filed under the Federal Employers Liability Act, Title 45, U.S.C.A. Sec. 51, et seq. *Wilkerson* v. *McCarthy*, 336 U.S. 53, 69 S.Ct. 413, 93 L.Ed. 497; *Harris* v. *Pennsylvania Railroad Co.*, 361 U.S. 15, 80 S.Ct. 22, 4 L.Ed.2d 1.

> "The fact that Congress has not seen fit to substitute that scheme (workmen's compensation) cannot relieve this court of its obligation to effectuate the present congressional intention *by granting certiorari to cor-*

rect instances of improper administration of the Act and to prevent its erosion by narrow and niggardly construction."

Rogers v. *Missouri Pacific Railroad Co.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493.

As indicated in the "Statement of Case" herein, plaintiff's evidence indicated that the death of the employee was due to heat exhaustion. This court granted certiorari in a heat exhaustion case in *Hendricks, Administratrix* v. *Southern Pacific*, 339 P.2d 731 (Arizona), cert. granted 361 U.S. 879, 80 S.Ct. 210, 4 L.Ed.2d 155. The foregoing case was later dismissed by the parties pursuant to Rule 60 of this court. This case, as well as other federal authorities, were ignored by the Supreme Court of Oklahoma in reaching its decision.

ARGUMENT AND AUTHORITIES

1.

In Deciding This Case under the Federal Employers Liability Act, the State Court Has Erroneously Applied the Standard of Proof Necessary to Support Recovery in a Common Law Negligence Action.

The Oklahoma court opinion cited *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U.S. 500, 1 L.Ed.2d 493, 77 S.Ct. 443, but failed to apply the standard of proof required by that decision.

"At the outset we note that this is *not* an ordinary negligence case which plaintiff must prove faulty by a preponderance of evidence. Rather this is a statutorily-created action which imposes on the plaintiff the burden of showing only *slight* negligence. - - - and because a statutory action under FELA significantly differs from a common law negligence action in terms

of standard of proof, it naturally follows that when an appellate court is asked to overturn the jury's verdict in a FELA case, we need only to look to see if the evidence is completely devoid of probative facts which support the conclusion reached."

Missouri-Kansas-Texas Railway Co. v. *Hearson*, 422 F.2d 1037 (10 Cir. 1970).

Rogers v. *Missouri Pacific Railroad Co.*, supra.

To apply the Oklahoma court's decision to future cases filed under the F.E.L.A. would:

"- - - subject the employee once more to the *stricter negligence standards of the common law* and such debilitating doctrines as assumption of risk."

Shenker v. *Baltimore & Ohio R.R. Co.*, 374 U.S. 11, 83 S.Ct. 1667 (1963).

The Oklahoma court quoted in part from this court's statement contained in *Urie* v. *Thompson*, 337 U.S. 163, 69 S.Ct. 1018, to the effect that "The Federal Employers Liability Act is founded on common law concepts of negligence and injury - - -." The complete quotation should have read as follows:

"We recognize - - - that the Federal Employers Liability Act is founded on common law concepts of negligence and injury *subject to such qualifications as Congress has imported into those terms.*"

* * *

"What constitutes negligence for the statute's purpose is a federal question, not varying in accordance with the differing concepts of negligence applicable under state and local laws for other purposes. Federal decisional law formulating and applying the concept governs."

Notwithstanding the foregoing statements of the applicable law, the Oklahoma court has given undue prominence and deference to the case of *Gulf, Colorado & Santa Fe*

Railway Co. v. *Waterhouse*, 223 S.W.2d 654, 1949, decided by the intermediate appellate court of Texas and applying Texas law of master and servant to a F.E.L.A. action. This case preceded *Rogers* v. *Missouri Pacific Railroad*, supra (1951). That the standard of proof of negligence expounded in *Waterhouse* should be applied to this case is indeed erroneous. Consider the following quotation from *Waterhouse*:

> "The foreman had a right to assume that - - - such a man would not push and pull beyond his capacity - - -. That the servant had assumed the risk of overheating referred to the fact that the servant had not asked leave to rest from his labors."

Such rights and duties cannot be engrafted into the law applicable to the Federal Employers Liability Act. To the contrary:

> "The likelihood of injury to man pulling or lifting beyond their capacity is obvious. Whether the straw boss in light of the risks should have used another or different method - - - is the issue."
>
> *Stone* v. *N.Y. Central, C. & St.L. R. Co.*, 344 U.S. 407, 73 S.Ct. 358, 97 L.Ed. 669.

To apply the common law standards recited in *Waterhouse*, a carrier would have no liability in those cases where the employee was injured by reason of strain or overheating, absent notice to the foreman that the employee was about to sustain injury. In other words, the employee must notify his foreman that his spinal disc is about to rupture or that he feels he is about to have a heat stroke. Petitioner submits that such standards of proof are not applicable to a F.E.L.A. case.

2.

The Court Has Sub Silento Applied the Common Law Doctrine of Assumption of Risk to Defeat Recovery on Behalf of the Deceased Employee.

The Oklahoma court quoted Justice Frankfurter's concurring opinion in *Tiller* v. *Atlantic Coast Line Railroad Co.*, 318 U.S. 54, 63 S.Ct. 444, 87 L.Ed. 610, which quotation was also contained in *Waterhouse*. This opinion, quoted out of context, failed to point out that no such statement is contained in the majority opinion of the court. In fact, the court's majority opinion in that case stated clearly:

> "The result is an act which requires cases tried under the Federal Act to be handled as though *no doctrine of assumption of risk ever existed.*"
>
> *Tiller* v. *Atlantic Coast Line Railroad*, supra (at p. 450).

Justice Frankfurter's opinion actually had the effect of a dissenting opinion, with reference to assumption of risk, as illustrated by his comments as follows:

> "I am not at all certain that the Circuit Court of Appeals misconceived the nature and extent of the carrier's liability after the 1939 amendments - - - [assumption of risk], but since I agree that the District Court should have allowed the case to go to the jury on the issue of negligence, I concur in the decision."

If the Oklahoma court based its decision on Justice Frankfurter's comments in the nature of dicta on assumption of risk, the court's opinion is erroneous for the reasons stated.

The Oklahoma court in its opinion made a further statement as follows:

> "The fact remains that Mr. Couch was under no compulsion by his employer to do the work which he was

doing when he collapsed in the manner in which he was doing it, that is to say, over an extended and prolonged period of time during the hottest hours of a summer day. *That Mr. Couch would choose to do the work in such manner could not reasonably be foreseen by the railroad.*"

This statement restates and applies the common law doctrine of assumption of risk to defeat recovery. 36 A.L.R.2d, p. 107. If the Oklahoma court had applied such a rule of law, the plaintiff could not have recovered in *Kansas City Southern Railway* v. *Norwood*, 367 P.2d 722 (Okla.), a case filed under the Federal Employers Liability Act. The deceased in this case may have been guilty of contributory negligence but contributory negligence does not defeat recovery under the Federal Employers Liability Act.

The Oklahoma court in effect has applied assumption of risk under the label of "no negligence."

3.

The Court Has Failed to Consider All of the Circumstantial Evidence Supporting the Employee's Cause of Action under the Federal Employers Liability Act.

This court has stated:

"The burden of the employee is met, and the obligation of the employer to pay damages arises, *when there is proof, even though entirely circumstantial,* from which the jury may with reason make that inference."

* * *

"Circumstantial evidence is not only sufficient but may be also more certain, satisfying and persuasive than direct evidence."

Rogers v. *Missouri Pacific R.R. Co.*, supra.

The Oklahoma court further required evidence as follows:

> "Absent some showing that the remaining employees were required in effect, to over-exert themselves - - - much as Mr. Couch apparently did before he suffered the fatal collapse, we fail to see any reasonable connection between the railroad's act in reducing personnel - - -."

Such a standard imposes an impossible burden of proof on the workman in this case who was working alone at the time of his death.

The Oklahoma court has in effect stated that direct eye witness proof is necessary to show that the employee was over-exerting himself as a result of a reduction in force at the precise time of his death. Under such a standard of proof, there could never be a recovery for an unwitnessed death under the Federal Employers Liability Act.

Decedent's wife testified as to deceased's exhaustion while working his assignment from Hominy, Oklahoma, to Oklahoma City. (C-M 273) The railroad had also denied deceased a promotion because the brush was not cut to defendant's satisfaction. This certainly is a form of discipline, if not compulsion. The photographs introduced in the case indicated that the defendant had abandoned the regular maintenance, permitting a virtual forest of trees to grow on its right-of-way. Whether the railroad in this case was negligent in sending out one man to cut down a forest with hand tools should be for a jury to decide, rather than by the Court.

CONCLUSION

Wherefore, petitioner respectfully prays that the court grant certiorari in this case to prevent the erosion of an employee's rights under the Federal Employers Liability Act by narrow and niggardly judicial construction.

R. KAY MATTHEWS
Atoka, Oklahoma 74525

JAMES E. DRISCOLL
Seminole, Oklahoma 74868

PAYNE RATNER
444 N. Market
P. O. Box 306
Wichita, Kansas 67201
Counsel for Petitioner

CERTIFICATE OF SERVICE

The undersigned does hereby certify that true copies of the foregoing petition were deposited in the United States Post Ofice with air-mail postage prepaid, addressed to Rainey, Flynn, Welch, Wallace, Ross & Cooper, 735 First National Building, Oklahoma City, Oklahoma; Joseph G. Ralls, 105 1/2 North Penn, Atoka, Oklahoma, and Lloyd W. Jones, 6703 Del Norte, Dallas, Texas.

This the 8th day of October, 1971.

.....

PAYNE RATNER

APPENDIX A

(Filed July 13, 1971)

FOR OFFICIAL PUBLICATION

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, a corporation,
Plaintiff in Error,
v.
GEORGIA COUCH, Administratrix of the Estate of Otis O. Couch, Deceased,
Defendant in Error.

No. 42,655

Appeal from the District Court of Atoka County, Oklahoma
Honorable Lavern Fishel, Trial Judge

Action for damages for wrongful death of railroad employee, brought under provisions of Federal Employers Liability Act. Verdict and judgment thereon for plaintiff. After the overruling of its motion for new trial, defendant railroad appealed.

JUDGMENT REVERSED AND CAUSE REMANDED TO TRIAL COURT WITH DIRECTIONS TO ENTER JUDGMENT FOR DEFENDANT

Rainey, Flynn, Welch, Wallace,
Ross & Cooper,
Oklahoma City, Oklahoma,

Joseph G. Ralls,
Atoka, Oklahoma,
Lloyd W. Jones,
Dallas, Texas,

For Plaintiff in Error,

R. Kay Matthews,
Atoka, Oklahoma,
James E. Driscoll,
Seminole, Oklahoma, For Defendant in Error.

* * * * * * * * * * *

LAVENDER, J.:

This appeal involves a verdict and judgment in favor of the defendant in error, Georgia Couch, Administratrix of the Estate of Otis O. Couch, Deceased, as plaintiff, against the plaintiff in error, Missouri-Kansas-Texas Railroad Company, a corporation, as defendant, in the principal amount of $60,000.00 as damages for the wrongful death of the said Otis O. Couch.

The defendant will also be referred to herein as "the Katy" and as "the railroad."

Mr. Couch was an employee of the railroad, and it may reasonably be inferred from the evidence, was engaged in the performance of his duties at the time of his death. The action was brought, expressly, under the provisions of the Federal Employers Liability Act (45 U.S.C.A. §§51 and following).

At the time of his death, and for several months prior thereto, Mr. Couch was employed by the Katy as an "assistant roadmaster" for the portion of the railroad's line between Hominy, Oklahoma, and Oklahoma City, which was divided into three "sections" for maintenance-of-way purposes. Basically, it was his duty, as assistant roadmaster, to patrol that portion of the line, by railroad motorcar, to spot maintenance and repair work that needed to be done on the tracks, roadbed, crossings and right-of-way (including the clearing of brush and trees from the right-of-way), and to see that the required work was done. In his discretion, he could either do the work himself, or he could call in the regular section gang for the particular

section of the line, or the "extra" gang assigned to his territory, to do the required work. He carried a number of hand-tools, including a "brush-axe," on his motorcar. No helper was assigned to ride and work with him, and he traveled alone.

His body was found, about seven o'clock in the evening on an August day, within the railroad's right-of-way and about seven or eight feet south of where his motorcar was standing on the track, about a mile and a half southwest of Cushing, Oklahoma. The body was slumped over on the knees with the head on the stump of a recently-cut tree. A brush-axe was on the ground beneath the body. Two recently-cut trees, one of which was about 24 or 25 inches in diameter, were on the ground, almost parallel to the ballast line, in the vicinity of the body.

Mr. Couch had had lunch in Cushing with the Katy agent, and had left the Cushing station about 12:45 p.m., after getting the train schedule for the rest of the day. He appeared to be in good health. Some time around one o'clock that afternoon, the railroad motorcar was seen standing on the track at about the same point where it was when the body was found, and a man was seen cutting trees in the right-of-way just south of the motorcar, by one of the three men who found the body later that day.

Weather bureau records for the Stillwater station, the reporting station nearest Cushing, for that day show that, as of one p.m., the temperature was 97 degrees, the wind southerly at 11 M.P.H., and the relative humidity was 49 per cent; that, as of two p.m., the temperature was 98 degrees, the wind southerly at 10 M.P.H., and the relative humidity 43 per cent; that, as of 3:05 p.m., the temperature was 99 degrees, the wind southeasterly at seven M.P.H., and the relative humidity 47 per cent; that, as of 3:50 p.m., the temperature was 99 degrees, the wind south-

easterly at 10 M.P.H., and the relative humidity 39 per cent; that, as of 4:55 p.m., the temperature was 98 degrees, the wind southeasterly at 17 M.P.H., and the relative humidity 37 per cent; that, as of 6:05 p.m., the temperature was 93 degrees, the wind southeasterly at 16 M.P.H., and the relative humidity 47 per cent; and that, as of 7:50 p.m., the temperature was 90 degrees, the wind southeasterly at 13 M.P.H., and the relative humidity 55 per cent.

Starting about 9:30 that same evening, an autopsy (without opening the cranium) was performed on the body in a funeral home at Oswego, Kansas. It was performed by Dr. W. of Parsons, Kansas, a practicing physician with special training in pathology and a number of years of practical experience in pathology and autopsies.

Based upon his observation and examination of the body, the heart, lungs, and abdominal organs, and the generally high temperatures prevailing in the area that day, and information given him concerning the type of work being done by Mr. Couch that day, Dr. W. stated, in his testimony by deposition as well as in his autopsy report:

> "It is my opinion that this man died of acute heart failure and shock manifested by acute pulmonary edema which caused suffocation. It is also my opinion that heat that this man was exposed to on this date can be attributed to as the causative factor in the chain of events leading to his death. The evidence is sufficient that I would describe this as the syndrome of heat stroke."

The plaintiff alleged that the railroad was negligent in the following respects: Some eight years prior to the time involved herein, the defendant railroad had made a drastic reduction in the number of section gangs, and in the number of men comprising a section gang, used in the maintenance and repair of its 3,241.35 total miles of trackage

and yardage, increased the length of the "section" assigned to each of the remaining section gangs, and created additional positions of "assistant roadmaster," with each one being assigned to patrol, and be responsible for the maintenance and repair of, several sections; that this wholesale reduction in the number of section gangs and in the number of men comprising a section gang continued until, about 18 months before the time involved herein, the number of section men for the railroad's 3,241.35 miles of line had been reduced from 762 to 105, and the number of assistant roadmasters had increased from 20 to 38; and that, at the time involved herein, the trackage, roadbed and right-of-way between Parsons, Kansas, and Oklahoma City, Oklahoma, was being patroled by Otis O. Couch, as assistant roadmaster for that sector, and was being maintained and repaired by Mr. Couch, as assistant roadmaster, and one maintenance gang consisting of a foreman and seven laborers.

The plaintiff alleged that this wholesale reduction in the maintenance-of-way force violated the defendant's non-delegable duty to furnish its employees a reasonably safe method of doing the work assigned, as well as its non-delegable duty to furnish its employees a sufficient number of competent employees to do the work assigned, and that, "in view of the above and foregoing," the defendant violated its non-delegable duty to furnish Otis O. Couch a reasonably safe place in which to work; and that these acts of negligence on the part of the defendant, either separately or collectively, were the direct and proximate cause of the death of Otis O. Couch, the plaintiff's decedent.

There was evidence that at least some of the reduction in the labor force was the result of an increase in use by the railroad of mechanical equipment to do the work formerly done by hand labor.

The primary question, however, for determination here is whether or not the evidence is sufficient to support (a) a finding that the defendant negligently failed to provide a sufficient number of competent employees to perform the assigned work or a finding that the defendant failed in its duty to provide Mr. Couch with a reasonably safe place in which to perform his assigned duties and a reasonably safe method for performing those duties, and (b) a finding that there was a causal connection between such negligence and Mr. Couch's sudden heart failure and death. We answer that question in the negative.

Evidence supported substantially all of the plaintiff's allegations concerning the defendant's reducing its maintenance-of-way force and the number of "sections" for maintenance-of-way purposes.

Prior to the original reduction in force, which occurred about eight years before Mr. Couch became assistant roadmaster for the Katy's line between Hominy and Oklahoma City (a distance of about 108 miles), the roadmaster for the line from Parsons, Kansas, through Hominy, to Oklahoma City had eleven section foremen (eleven maintenance-of-way sections) and fourteen section laborers working under him on the line between Hominy and Oklahoma City. In addition to Mr. Couch as assistant roadmaster, that roadmaster had, at the time of Mr. Couch's death, three section foremen (three maintenance-of-way sections) and five section laborers, and an extra gang, also referred to as a "mobile gang," consisting of a foreman and five laborers working out of Cleveland, Oklahoma, working under him on the line between Hominy and Oklahoma City.

The trial court admitted in evidence, over the objection of the defendant, a series of 23 black-and-white photo-

graphs that had been taken four or five months before Mr. Couch took this particular job some eight months before his death, at various points on the right-of-way between Hominy and Oklahoma City. They showed some trees and some brush or weeds on the right-of-way. The Katy's division engineer admitted, on cross-examination, that those pictures showed a "pretty sorry state of upkeep" insofar as the right-of-way (other than the track and roadbed) was concerned.

The plaintiff introduced into evidence two black-and-white photographs taken at the scene of Mr. Couch's death. Each shows some weeds or brush in the area, one standing tree with a branch growing outward just above the ground, and two adjacent trees that appear to have been recently cut. The body was found at the base of these trees.

The defendant introduced into evidence a number of color slides taken in the same general area. There are a number of different views of one standing tree with a branch growing outward near the ground and two adjacent trees that appear to have been recently cut. The railroad employee who took these pictures said that one of the two cut trees measured 25 inches in diameter and the other one 23 and a half inches in diameter. On that basis, some of the weeds in the area were as much as two and a half to three feet high. One of these photographs disclosed that the branch growing out of the standing tree, just above the ground, had been chopped part of the way through. The employee said that this branch was 17 inches in diameter. Another one of these photographs shows another felled tree in the area, but the employee gave no estimate of the size of that tree.

There was evidence to the effect that Mr. Couch's duties, as assistant roadmaster, combined some of the duties of several jobs, including some of those of a section

foreman; that a section foreman for the Katy, and for at least one other railroad company operating in Oklahoma (which, incidentally, had roadmasters, right-of-way supervisors, and section foremen and laborers, but no assistant roadmasters), generally was assigned one laborer to ride and work with him, whereas no one was assigned to ride and work with Mr. Couch or any other assistant roadmaster for the Katy. When asked if there was any other method by which Mr. Couch could have accomplished his assigned duties, a long-time maintenance-of-way employee of the other railroad made statements (objected to by the defendant) to the effect that Mr. Couch should have had a man to help him with the motorcar, to operate it so that Mr. Couch could give his undivided attention to his inspection of the track, roadbed and right-of-way, and to help him remove the motorcar from the track, and to help Mr. Couch with the maintenance work and change off with him so that he wouldn't get too hot cutting brush and trees, and also to render aid, or get aid, in case anything happened to Mr. Couch.

When asked if there was any additional method by which Mr. Couch could have accomplished his assigned duties, this same witness made a statement (objected to by the defendant) to the effect that the Katy's system prior to the reduction in force, using more maintenance-of-way "sections" and employees, was a proper method for accomplishing the assigned work.

The evidence does not indicate that the holder of any job not abolished in any reduction of force was required to produce more work or results in a given time than before the reduction in force. It does not indicate that it was the duty of Mr. Couch, as assistant roadmaster, to see that the right-of-way between Hominy and Oklahoma City was put and/or kept in any better condition than the "sorry

state of upkeep" indicated by the 23 photographs that were taken some eight months before he took that job. Nothing in any of the photographs taken at the scene of Mr. Couch's death indicates that more than one man would be required to do the type of work he apparently was doing just before his death.

The plaintiff made no attempt to show that a railroad right-of-way (even one in the "pretty sorry state of upkeep" indicated by the 23 photographs taken about a year before Mr. Couch's death), or the area on this particular right-of-way where Mr. Couch was working just prior to his death, is not a reasonably safe place for a person to be chopping trees or brush with a brush-axe, at least when, as in this instance, no equipment is moving on the adjacent railroad track. She made no attempt to show, and she does not argue, that it was the railroad's duty to provide an employee with protection from the sun and/or the heat while chopping trees or brush on its right-of-way on a very hot day.

Insofar as the evidence is concerned, inspection of the track, roadbed and right-of-way, operation of the motorcar, and removing it from the track had nothing whatsoever to do with Mr. Couch's sudden heart failure and death. That Mr. Couch and another employee might have taken turns chopping trees or brush and that Mr. Couch would have rested while the other employee chopped, if there had been another employee riding and working with him, is pure surmise. Insofar as the evidence is concerned, Mr. Couch's heart would have suddenly failed, in the circumstances, regardless of how many men were chopping trees or brush alongside him. There is no evidence that any one could have saved Mr. Couch's life after heat stroke commenced (if he suffered heat stroke) or after his heart suddenly stopped functioning.

The plaintiff in the brief filed herein on her behalf and in oral presentation of this cause before the entire court has called our attention to a number of decisions of both the U. S. Supreme Court and the Federal courts of appeals, as well as decisions of other state courts. We have carefully studied these authorities and, while it is well established that what constitutes negligence which will make a railroad liable in damages under the Federal Employers' Liability Act is a federal question (Urie v. Thompson, (1949), 337 U.S. 163, 93 L.Ed. 1282, 69 S.Ct. 1018; and Rogers v. Missouri Pacific Railroad Co., (1957), 352 U.S. 500, 1 L.Ed.2d 493, 77 S.Ct. 443), it is equally well established that "The Federal Employers' Liability Act is founded on common law concepts of negligence and injury * * *." (Urie v. Thompson, supra.) It is also said, "A railroad is not an insurer under the F.E.L.A. of the safety of its employees; the Act does not authorize a recovery in the absence of negligence and there can be no negligence on the part of the employees of the carrier unless they fail to discharge some duty which they owe to the injured servant." (56 C.J.S. Master and Servant, §173, pages 849 through 851, the footnotes to which refer to a number of state and federal cases.)

In the 15th syllabus paragraph in Urie v. Thompson the Supreme Court said, "Ordinary care to be exercised by railroad to avoid liability under F.E.L.A. must be commensurate with known dangers and must be in proportion to the danger to be avoided and the consequences that might reasonably be anticipated from neglect." In the more recent case of Gallick v. Baltimore and Ohio Railroad Co., (1963), 372 U.S. 108, 9 L.Ed.2d 618, 83 S.Ct. 659, the court (citing a number of its previous opinions) stated, "Reasonable foreseeability of harm is an essential ingredient of F.E.L.A. negligence."

In the Gallick v. B. & O. case the employee foreman was held entitled to recover for disability resulting from an insect bite suffered under circumstances indicating knowledge on the part of the railroad that there was a stagnant, putrid pool of water in and about which such type insects had been observed for years; that the pool was on the right-of-way and that employee in performing his work was required to stand nearby.

In the Urie v. Thompson case the negligence consisted of using 80 to 90 per cent silica or silicon dioxide in the sand used by the railroad coupled with "faultily adjusted sanders." It was said that the railroad should have foreseen that its employee exposed to such sand, while working, for a number of years would eventually contract silicosis.

In Dennis v. Denver & Rio Grande Western Railroad Co. (1963), 375 U.S. 208, 11 L.Ed.2d 256, 84 S.Ct. 291, the negligence consisted of "permitting" the employee to continue to work in freezing weather conditions when the foreman knew that "petitioner was dressed less warmly than the other members of the crew." There was also evidence the foreman knew that petitioner was complaining of burning and tingling sensations in his fingers. (Recovery was allowed for frost-bitten fingers.) The railroad's liability was said to be for the jury to determine because the foreman "who had full control over the petitioner's activities while on this job, did not take all necessary and reasonable precautions to prevent injury to petitioner when put on notice of his (petitioner's) condition." (There was evidence that the employee could have been allowed to warm up in a heated truck standing nearby.)

In a special concurring opinion in the case of Tiller v. Atlantic Coast Line Railroad Co., (1943), 318 U.S. 54, 87 L.Ed. 610, Mr. Justice Frankfurter, after discussing the

1939 amendment to the Act which removed the defense of assumption of risk, wrote (P. 619 of 87 L.Ed.):

> "But the 1939 amendment left intact the foundation of the carrier's liability—negligence. Unlike the English enactment which, nearly fifty years ago, recognized that the common law concept of liability for negligence is archaic and unjust as a means of compensation for injuries sustained by employees under modern industrial conditions, the federal legislation has retained negligence as the basis of a carrier's liability. For reasons that are its concern and not ours, Congress chose not to follow the example of most states in establishing systems of workmen's compensation not based upon negligence. * * *"

and,

> "(the 1939 legislation) has left undisturbed the other meaning of 'assumption of risk,' namely, that an employee injured as a consequence of being exposed to a risk which the employer in the exercise of due care could not avoid is not entitled to recover, since the employer was not negligent."

In other words, the removal of "assumption of risk" as a defense available to the railroad did not relieve the employee's survivors from establishing that the railroad breached some duty of ordinary care which resulted in whole or in part in the employee's death.

Summarizing the record in this case we think it fairly shows the employment of an able-bodied man by the railroad to do certain work along the railroad's right-of-way, which work included using a brush axe to cut brush and trees. The right-of-way had been permitted to grow up in brush and trees to such an extent that one of the defendant's witnesses described it as "sorry." There was no evidence that with the corresponding reduction in personnel available to do maintenance of right-of-way work that the

remaining employees were required by the railroad to do any more of that type of work than they had done formerly. The right-of-way was simply not maintained as well as—apparently—it had been before the reduction in number of employees.

Absent some showing that the remaining employees were required, in effect, to over-exert themselves in doing maintenance-of-way work much as Mr. Couch apparently did before he suffered the fatal collapse, we fail to see any reasonable connection between the railroad's act in reducing personnel and the death of Mr. Couch while cutting trees and brush. The theory argued by counsel for plaintiff, that Mr. Couch may have over-exerted himself because he was ambitious for a promotion, hardly furnishes sufficient grounds to impose liability for negligence in tort upon the railroad.

The fact remains that Mr. Couch was under no compulsion by his employer to do the work which he was doing when he collapsed in the manner in which he was doing it, that is to say, over an extended and prolonged period of time during the hottest hours of a summer day. That Mr. Couch would choose to do the work in such manner could not reasonably have been foreseen by the railroad. The latter had a right, we think, to assume that Mr. Couch would himself exercise some reasonable discretion and common sense about the way in which he performed the work. While the railroad cannot claim Mr. Couch assumed the risks of his employment and therefore his survivors cannot recover, neither may the latter contend successfully that under the circumstances of this case and notwithstanding the exercise of poor judgment on the part of their decedent the railroad should be held to respond in damages based on negligence.

The situation in this case is not like that directly involved in Gulf, Colorado & Santa Fe Railway Company v. Waterhouse (Texas Civ.App.), 223 SW 2d 654, wherein the railroad employee reported to his foreman that he was getting dizzy, after chopping brush on the right-of-way for some time on a very hot summer afternoon with little or no wind, and was ordered to go back to work. It is more like the situation in that case before the man reported that he was dizzy and was ordered back to work, wherein the employee was an experienced workman, accustomed to doing manual labor in hot weather, and was free to adjust his efforts to the prevailing weather and his own physical capacity.

Like the defendants in Moses v. Harris et al. (1925), 111 Okl. 54, 237 P. 591, the defendant in the present case demurred to the plaintiff's evidence and, at the close of all of the evidence, moved for a directed verdict. That motion was overruled. In that case, this court held, in the first paragraph of its syllabus:

> "On a challenge to the sufficiency of the evidence to support the verdict, the question presented on appeal is, admitting the truth of all the evidence of the plaintiff, together with such inferences and conclusions as may reasonably be drawn therefrom, eliminating all evidence of defendant in conflict with plaintiff's evidence, and all opposing inferences, whether there is any competent evidence tending to support the verdict against defendant."

The parties hereto do not question that rule. Applying it to the present case, there is no competent evidence reasonably tending to support a finding that negligence on the part of the defendant railroad played any part whatsoever in Mr. Couch's sudden heart failure and death. The trial court erred in overruling the defendant's motion for a

directed verdict. The verdict and judgment rendered thereon must be set aside on appeal. [Moses v. Harris et al., supra].

This view makes it unnecessary for us to consider any other questions raised by either of the parties.

The judgment in favor of the plaintiff and against the defendant is reversed and the cause remanded to the trial court with directions to enter judgment in favor of the defendant and against the plaintiff.

ALL OF THE JUSTICES CONCUR.

APPENDIX B

(Filed September 20, 1971)

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, a Corporation, Plaintiff in Error,

vs.

GEORGIE COUCH, Administratrix of the Estate of Otis O. Couch, Deceased.

No. 42,655

Order Issuing Mandate but Staying Enforcement Thereof

This cause is reached for consideration of the motion by defendant in error to stay the enforcement of this court's decision pending appeal to the Supreme Court of the United States.

For good cause shown, the mandate in this appeal is ordered issued, but its enforcement in the trial court is hereby stayed until November 1, 1971, pending the perfection of an appeal by the defendant in error to the Supreme Court of the United States; and if said appeal will stand perfected on or before November 1, 1971, enforcement of the mandate shall be further stayed until such time as the Supreme Court of the United States renders a final decision herein, or until further order of this court.

The order entered herein September 14, 1971 issuing mandate and staying enforcement thereof is hereby withdrawn and vacated.

DONE BY ORDER AND DIRECTION OF THE SUPREME COURT IN CONFERENCE THIS 20th DAY OF SEPTEMBER, 1971.

/s/ Wm. A. Berry
Chief Justice

APPENDIX C

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

APPENDIX D

§ 54. Assumption of risks of employment

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, § 4, 35 Stat. 66; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
NOV 3 1971
E. ROBERT SEAVER, CLE

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-518

GEORGIA COUCH, Administratrix of the Estate of
Otis O. Couch, Deceased,
Petitioner,

VERSUS

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
a corporation,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

DONALD L. COOPER
735 First National Building
Oklahoma City, Oklahoma 73102
Counsel for Respondent

November, 1971

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0080

TABLE OF CONTENTS

	PAGE
Statement of Case	1
Response to "Questions Presented"	3
Response to "Reasons for Granting the Writ"	4
Response to Petitioner's Heading "In Deciding This Case Under the Federal Employers' Liability Act, the State Court Has Erroneously Applied the Standard of Proof Necessary to Support Recovery in a Common Law Negligence Action."	5
Response to Petitioner's Heading "The Court Has Sub Silento Applied the Common Law Doctrine of Assumption of Risk to Defeat Recovery on Behalf of the Deceased Employee."	7
Response to Petitioner's Heading "The Court Has Failed to Consider All of the Circumstantial Evidence Supporting the Employee's Cause of Action Under the Federal Employers' Liability Act."	8
Reason for Denying the Writ Prayed for by Petitioner	12
Conclusion	13

TABLE OF CASES

Brady v. Southern Railway Co., 320 U.S. 476, 88 L.Ed. 239, 64 S.Ct. 232	11
Creamer v. Ogden Union Railway & Depot Co. (S.C. Utah), 242 P.2d 575, cert. denied 344 U.S. 912, 97 L.Ed. 703, 73 S.Ct. 333	11
Dennis v. Denver & Rio Grande Western Railroad Co., 375 U.S. 208, 11 L.Ed.2d 256, 84 S.Ct. 291	9
Gallick v. Baltimore & Ohio Railroad Company, 372 U.S. 108, 9 L.Ed.2d 618, 83 S.Ct. 659	8, 11

AUTHORITIES CONTINUED PAGE

Gulf, Colorado & Santa Fe Railway Company v. Waterhouse (Tex. Civ. App.), 223 S.W.2d 654 ..... 6, 10

Inman v. Baltimore & Ohio Railroad Co., 361 U.S. 138, 4 L.Ed.2d 198, 80 S.Ct. 242 ..... 7, 8

Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500, 1 L.Ed.2d 280, 77 S.Ct. 443 ..... 5, 6

Southern Pacific Company v. Hendricks, Administratrix, 85 Ariz. 373, 339 P.2d 731, cert. granted 361 U.S. 899, 4 L.Ed.2d 155, 80 S.Ct. 210, cert. dismissed 361 U.S. 941, 4 L.Ed.2d 362, 80 S.Ct. 385 ..... 4, 10, 11

Stone v. New York, Chicago & St. Louis Railroad Co., 344 U.S. 407, 97 L.Ed. 441, 73 S.Ct. 358 6

Tiller, Executor v. Atlantic Coast Line Railroad Co., 318 U.S. 54, 84 L.Ed. 610, 63 S.Ct. 472 5

In the
Supreme Court of the United States
OCTOBER TERM, 1971

No. 71-518

GEORGIA COUCH, Administratrix of the Estate of
Otis O. Couch, Deceased,
Petitioner,

VERSUS

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
a corporation,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

In response to the Petition for Writ of Certiorari filed by petitioner and received by respondent on October 12, 1971, respondent respectfully submits:

STATEMENT OF CASE

Otis O. Couch had worked for respondent since at least 1954, with the exception of three years. (R. 268, 291-292) During this time, he had been a Section Laborer, Extra Gang Foreman, Machine Operator, Section Foreman and Assistant Roadmaster. (R. 290) Mr. Couch requested re-employment in December, 1960, and was assigned as Assistant Roadmaster on respondent's St. Louis Division. (R. 291) Mr. Couch assumed duties as Assistant Road-

master on respondent's Hominy to Oklahoma City territory in December, 1962. (R. 273) His duties for respondent at that time included traveling by motor car over this territory to discover defects in tracks, roadbed and crossings. As part of such duties, he could replace bolts, angle bars, loose spikes, tighten nuts, shovel ballast, and cut brush, if necessary. In his position, he determined whether a section crew would be needed, and if so, reported deficiencies to that crew or led and supervised the crew himself. (R. 135-136, 294)

In 1954, respondent had "about twenty-eight" Section Foremen and laborers for maintenance of track between Hominy, Oklahoma, and Oklahoma City, Oklahoma. (R. 179) Beginning in 1955, a program of reduction was instituted by respondent. Concurrent therewith, respondent initiated the acquisition and use of mechanical equipment. (R. 133-134, 295-296) On August 5, 1963, the area of track was maintained by four Section Foremen and ten section laborers. (R. 295-296) A Roadmaster and an Assistant Roadmaster patroled the stretch of secondary main line track. (R. 295) Mr. Couch had no one with him on the date of his death. Another railroad operating in Oklahoma had track supervisors who inspected the track and roadbed, usually taking a man with them. (R. 255-256)

On August 5, 1963, Mr. Couch had lunched with respondent's station agent in Cushing, Oklahoma. He returned to his duties at 12:45 o'clock p.m. on that date, giving no indication of physical incapacity. (R. 323, 324)

A man was seen cutting trees on defendant's track at a point approximately one and one-half miles Southwest of

Cushing, Oklahoma, at approximately 1:15 o'clock p.m. on that date. (R. 146-147) The body of Mr. Couch was discovered at that point at approximately 7:00 o'clock p.m. (R. 138) The records of the Weather Bureau for the reporting station nearest Cushing, Oklahoma, on August 5, 1963, reveal the temperatures ranged from 93 degrees to 99 degrees Farenheit between 1:00 o'clock p.m. and 6:05 o'clock p.m.; the wind velocity to have been from 7 mph to 17 mph during the same period; and, the relative humidity was from 37 per cent to 49 per cent during such period. (Plaintiff's Exhibit No. 7, R. 110, 456)

An autopsy was performed at approximately 9:30 o'clock p.m. the same evening. (R. 185) The examining physician's opinion as to the cause of Mr. Couch's death was acute heart failure. The causative factor being heat principally, together with conditions of exertion on the part of Mr. Couch. (R. 189, 200)

RESPONSE TO "QUESTIONS PRESENTED"
(Petitioner's Brief, Page 2)

Petitioner has set forth three separate questions which, to respondent, present one question. That question is whether the Supreme Court of the State of Oklahoma erroneously applied the standard of proof necessary to support a common law negligence action.

RESPONSE TO "REASONS FOR GRANTING THE WRIT"
(Petitioner's Brief, Pages 6 and 7)

Unquestionably, this Court has, in the past, exercised supervision and stewardship over judgments and decrees rendered by Federal and State courts in actions filed under the Federal Employers' Liability Act. Petitioner, however, asserts this Court should grant certiorari because the Supreme Court of the State of Oklahoma ignored the case of *Southern Pacific Company* v. *Hendricks, Administratrix*, 85 Ariz. 373, 339 P.2d 731, *certiorari granted* 361 U.S. 899, 4 L.Ed.2d 155, 80 S.Ct. 210, *certiorari dismissed* 361 U.S. 941, 4 L.Ed.2d 362, 80 S.Ct. 385, "as well as other federal authorities."

Granting of certiorari by this Court can only mean that at least four members of the Court deemed the petition in that case to be of sufficient importance *as to the facts of that case* that the same should be considered on its merits by the full Court. No decision was rendered on the merits of that case because the same was later dismissed pursuant to Rule 60 of this Court. It is worthy to also note that the *Southern* decision was based upon the failure to furnish medical assistance once the employer was placed on notice of the need therefor.

RESPONSE TO PETITIONER'S HEADING "IN DECIDING THIS CASE UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT, THE STATE COURT HAS ERRONEOUSLY APPLIED THE STANDARD OF PROOF NECESSARY TO SUPPORT RECOVERY IN A COMMON LAW NEGLIGENCE ACTION."

(Petitioner's Brief, Page 7)

Respondent understands the standard of proof in actions of this nature to be "* * * whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U.S. 500, 1 L.Ed.2d 280, 77 S.Ct. 443. Negligence of the employer is "* * * the lack of due care under the circumstances; or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation; or doing what such a person under the existing circumstances would not have done." *Tiller, Executor* v. *Atlantic Coast Line Railroad Co.*, 318 U.S. 54, 87 L.Ed. 610, 63 S.Ct. 472. In the *Tiller* case, this Court gave further insight to the subject by stating:

> "A fair generalization of the rule is given in the Senate Committee report on the 1939 amendment: 'In justice, the master ought to be held liable for injuries attributable to *conditions under his control* when they are not such as a reasonable man ought to maintain in the circumstances.'" (Emphasis supplied.)

A court need only determine if the evidence is devoid of probative facts from which a conclusion may be drawn that employer negligence played any part in its employee's

injury or death. *Rogers* v. *Missouri Pacific Railroad Co., supra.*

The Supreme Court of the State of Oklahoma followed the standards set forth by this Court as is revealed in the following quotation from its opinion:

> " 'On a challenge to the sufficiency of the evidence to support the verdict, the question presented on appeal is, admitting the truth of all the evidence of the plaintiff, together with such inferences and conclusions as may reasonably be drawn therefrom, eliminating all evidence of defendant in conflict with plaintiff's evidence, and all opposing inferences, whether there is any competent evidence tending to support the verdict against defendant.' "

Petitioner calls attention to the case of *Gulf, Colorado & Santa Fe Railway Company* v. *Waterhouse* (Tex. Civ. App.), 22[illegible] S.W.2d 654, stating the Supreme Court of the State of Oklahoma placed undue prominence on the decision of the Texas Court. A reading of the *Waterhouse* decision reveals the latter Court recognized and scrupulously followed the directions set forth in earlier decisions rendered by this Court. That the opinion did not stand on the Texas law of master and servant should be obvious.

Petitioner, however, utilizes, out of context, a statement of this Court from the opinion rendered in *Stone* v. *New York, Chicago & St. Louis Railroad Co.*, 344 U.S. 407, 97 L.Ed. 441, 73 S.Ct. 358, to demonstrate how the Texas Court failed to apply proper standards when appraising the proofs. A more complete utilization of this Court's opinion in *Stone* would be appropriate. At page 409 thereof, it is indicated the section crew had encountered

other stubborn ties in that stretch of track, that other methods of removal of such ties were available, that other men were then available and that petitioner therein had warned his foreman that he had been pulling as hard as he could. He was ordered to pull harder and injured his back in so doing. The risks of injury *on those facts* were obvious. Petitioner would seem to ask this Court, on the basis of one sentence in *Stone,* to hold this employer to a duty of anticipating the likelihood of an injury or death of an employee under any circumstance. This would naturally mean such employer is an insurer of its employees. This Court has specifically held "the Act does not make the employer an insurer." *Inman* v. *Baltimore & Ohio Railroad Co.,* 361 U.S. 138, 4 L.Ed.2d 198, 80 S.Ct. 242.

RESPONSE TO PETITIONER'S HEADING "THE COURT HAS SUB SILENTO APPLIED THE COMMON LAW DOCTRINE OF ASSUMPTION OF RISK TO DEFEAT RECOVERY ON BEHALF OF THE DECEASED EMPLOYEE."

(Petitioner's Brief, Page 10)

The Supreme Court of the State of Oklahoma clearly recognized the doctrine of assumption of risk had no applicability to this action. That Court plainly made no application of the doctrine to defeat recovery by petitioner. On the contrary, the Oklahoma Court recognized the question clearly. The following statement from its opinion demonstrates this:

> "In other words, the removal of 'assumption of risk' as a defense available to the railroad did not relieve the employee's survivors from establishing that the railroad breached some duty of ordinary care which resulted in whole or in part in the employee's death."

The statement of the Oklahoma Court relied on by petitioner to show that Court applied the doctrine of assumption of risk to defeat recovery by petitioner further demonstrates the point. The point in controversy being what the railroad could reasonably anticipate or foresee under the circumstances of this case. This is true in determining whether the employer is negligent and whether any such negligence proximately caused in whole or in part, the death of its employee. *Gallick* v. *Baltimore & Ohio Railroad Company,* 372 U.S. 108, 9 L.Ed.2d 618, 83 S.Ct. 659, and *Inman* v. *Baltimore & Ohio Railroad Co., supra.*

RESPONSE TO PETITIONER'S HEADING "THE COURT HAS FAILED TO CONSIDER ALL OF THE CIRCUMSTANTIAL EVIDENCE SUPPORTING THE EMPLOYEE'S CAUSE OF ACTION UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT."

(Petitioner's Brief, Page 11)

It is apparent the Supreme Court of the State of Oklahoma considered all the evidence which might be favorable to petitioner, be it circumstantial or otherwise. The Court's opinion refers to all such evidence. The real problem confronted by petitioner is that the Oklahoma Court has required her to establish proof of respondent's negligence together with proximate cause.

Petitioner assumes her decedent was "over-exerting" himself at or before his death on August 5, 1963. There is no evidence in the record to show such. Counsel for petitioner, by his own question, assumed over-exertion and seeks to rely thereon. (R. 193)

There is no evidence that as a result of the reduction in personnel, other employees or petitioner's decedent

were required to do any more work than before such reduction. There is no evidence that any remaining employees of respondent were required to or did "over-exert" themselves while employed for respondent. There is no evidence that respondent was aware of any condition possessed by Mr. Couch which would create the likelihood of harm to him. There is no evidence from which it may be reasonably inferred that the place and manner of Mr. Couch's work produced the likelihood of danger to Mr. Couch which could or should have been eliminated by respondent in the exercise of reasonable care. There is no evidence from which it may be reasonably inferred that the usual accompaniment by other employees would have been reasonably expected to prevent, or assist in preventing, injury to or death of Mr. Couch.

Respondent does not have control of the sun or the differences in temperatures, winds or humidity. These are conditions which may not be eliminated. The fact Mr. Couch was working in the sun is not sufficient to require respondent to reasonably anticipate some harm would come to him. If this were true, then this Court need not have proceeded beyond finding the petitioner in *Dennis* v. *Denver & Rio Grande Western Railroad Co.*, 375 U.S. 208, 11 L.Ed.2d 256, 84 S.Ct. 291, was working in temperatures from 10 degrees Farenheit to minus 5 degrees Farenheit. In *Dennis, supra,* this Court held negligence of the railroad was established by proof ". . . that the foreman, who had full control over petitioner's activities while on this job, did not take all necessary and reasonable precautions to prevent injury to petitioner *when put on notice of his* condition." (Emphasis supplied.) In the present action, the

deceased was in full control of his work and had the discretion to decide the manner and time for performance of the same. There is no evidence respondent had notice of any propensity of the deceased employee for heart attack or heat stroke. Whether a railroad may keep a reasonable check of climatological conditions over all its lines for a twenty-four hour period, and the methods by which it may do so, are subjects of far-reaching imagination, particularly on the evidence herein.

Likewise, the fact Mr. Couch was working alone and was not accompanied by another person gives no cause to reasonably anticipate harm would come to him. If this were true, then respondent would be an insurer for all possible risks of harm to its employees. Respondent would be required to have its clerical help cross traveled streets in pairs because four eyes are better than two. That another person with Mr. Couch would have prevented his death is not a reasonable inference from the facts of this case. There is no evidence in the record of any similar experiences on respondent's railroad although case law reveals heat strokes occur to men working in concert with others. *Southern Pacific Company* v. *Hendricks, supra,* and *Gulf, Colorado & Santa Fe Ry. Co.* v. *Waterhouse, supra.*

There is no evidence petitioner's decedent was performing any greater duties than usual or was required to do so. Nor is it reasonable to say that the exertion of Mr. Couch, had additional men been present, would have been such as to prevent injury to or death of Mr. Couch, unless one assumes he should not have been exerting himself in any event. The cause of death was said to be the heat coupled with exertion. The same physician also stated heat

stroke to be a result of the cessation of perspiration. Why this occurs no one knows. (R. 192) In the *Inman* case, there was evidence to the effect that a lot of cars had been seen to jump the gun at the crossing in question. Yet this Court found that on the facts of that case the risk of harm was too tenuous and was not reasonably foreseeable by the employer. The slender reed in *Inman, supra,* is totally absent in this case.

Petitioner has cited *Southern Pacific Company* v. *Hendricks, supra,* as reason for this Court to grant certiorari. That case was decided by the Supreme Court of Arizona on the principle that the employer therein failed to furnish medical help when placed on notice of the illness of the employee. It does not reach the fact situation of this cause. An employee incurring a heart attack while performing heavy labor on a hot August day has been denied recovery under the Federal Employers' Liability Act in absence of proof the employer was negligent. *Creamer* v. *Ogden Union Railway & Depot Co.* (S.C. Utah), 242 P.2d 575, *certiorari denied* 344 U.S. 912, 97 L.Ed. 703, 73 S.Ct. 333. The fact of death from heat stroke should not make respondent liable without proof of negligence contributing thereto.

Reasonable foreseeability of risk of harm is an essential ingredient of negligence in an action such as this. *Gallick* v. *Baltimore & Ohio Railroad Co., supra.* Additionally, any injury or death must be the natural and probable consequence of that negligence which should have reasonably been anticipated under the circumstances. *Brady* v. *Southern Railway Co.,* 320 U.S. 476, 88 L.Ed. 239, 64 S.Ct. 232. Petitioner's proof supports neither.

REASON FOR DENYING THE WRIT PRAYED FOR BY PETITIONER

Petitioner seeks, in effect, only a review of the evidence in this cause. The Supreme Court of the State of Oklahoma, in its opinion, clearly demonstrates utilization of the proper guidelines set forth by this Court. Petitioner has had a full and fair review of the facts in this cause. Upon such review, the Supreme Court of the State of Oklahoma properly concluded the proof did not justify a conclusion that respondent was negligent or that any act or omission of respondent contributed in any way to the death of petitioner's decedent. Under such circumstances, there is no special or important reason for granting a writ of certiorari as prayed. In essence, plaintiff seeks to have this Court reverse its many decisions requiring recovery under the FELA to be based on proof of some negligence on the part of the employer. Plaintiff seeks to have this Court permit recovery merely on proof of injury or death during the course of employment, and thereby to make the employer an absolute insurer. This Court should not depart from its long established decisions to the contrary.

CONCLUSION

The Supreme Court of the State of Oklahoma properly and fully reviewed the evidence in this case and unanimously determined the same failed to support a finding of respondent's negligence or causation. Having done so, there is no sufficient or important reason for this Court to grant the writ of certiorari prayed for.

It is respectfully urged that the writ prayed for by petitioner be denied.

DONALD L. COOPER
735 First National Building
Oklahoma City, Oklahoma 73102
Counsel for Respondent

November, 1971

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JAN 27 1972
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-518

GEORGIA COUCH, ADMINISTRATRIX OF THE ESTATE OF OTIS O. COUCH, DECEASED,
Petitioner,

vs.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
a corporation.
Respondent.

PETITION FOR REHEARING ON COURT'S ORDER DENYING PETITION FOR WRIT OF CERTIORARI

R. KAY MATTHEWS
Atoka, Oklahoma 74525

JAMES E. DRISCOLL
Seminole, Oklahoma 74868

PAYNE RATNER
444 N. Market
P. O. Box 306
Wichita, Kansas 67201
Counsel for Petitioner

E. L. MERTENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-8080

TABLE OF CONTENTS

Reasons for Granting Petitioner's Petition for Rehearing 2

Statement of Points of Law Overlooked or Misapprehended 2

Argument and Authorities 2

Conclusion 5

Certificate of Service 7

Certificate of Counsel 7

Authorities Cited

TABLE OF CASES

Basham v. *Pennsylvania Railroad,* 372 U.S. 699, 83 S.Ct. 965, 10 L.Ed.2d 80 6

Dennis v. *Denver & Rio Grande Western Railroad Co.,* 375 U.S. 208, 34 S.Ct. 291, 11 L.Ed.2d 256 4

Ferguson v. *Moore-McCormack Lines,* 352 U.S. 521, 77 S.Ct. 457, 1 L.Ed.2d 511 3

Gallick v. *Baltimore and Ohio Railroad Company,* 372 U.S. 108, 83 S.Ct. 659, 9 L.Ed.2d 618 3

Riggs v. *Penn Central Railroad Company,* 442 F.2d 105 (1971) 2

Rogers v. *Missouri Pacific Railroad Co.,* 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 ..... 1, 2

Tiller v. *Atlantic Coast Line Railroad,* 318 U.S. 54, 63 S.Ct. 444, 87 L.Ed. 610 ..... 4, 5

OTHER AUTHORITIES

35 Am.Jur., Sec. 299, p. 723 4

Speech by Chief Justice Burger, Oct. 4, 1971 5

U. S. Const., 7th Amendment 5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-518

GEORGIA COUCH, ADMINISTRATRIX OF THE ESTATE OF OTIS O. COUCH, DECEASED,
Petitioner,

vs.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
a corporation,
Respondent.

PETITION FOR REHEARING ON COURT'S ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, pursuant to Rule 58(2) of this Court respectfully prays that the Court reconsider its order entered on January 10, 1972, in the above captioned case denying petitioner's petition for a writ of certiorari. Petitioner submits that the Court has overlooked or misapprehended the force and effect of the landmark case of *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493, as indicated in the opinions of Justice Douglas and Justice Brennan.

REASONS FOR GRANTING PETITIONER'S PETITION FOR REHEARING

The effect of this decision is to overrule by implication *Rogers* v. *Missouri Pacific Railroad Co.*, supra, which has guided the lower courts since 1957. The very recent case of *Riggs* v. *Penn Central Railroad Company*, 442 F.2d 105 (1971) reaffirmed *Rogers*, stating:

> "The evidence need only be enough to justify a jury's determination that employer negligence had *played any role* in producing the harm."

STATEMENT OF POINTS OF LAW OVERLOOKED OR MISAPPREHENDED

Whether a jury question was presented by the evidence bearing on the adequacy of respondent railroad's repair and maintenance practices.

ARGUMENT AND AUTHORITIES

The Court's decision leaves standing a state court's opinion resting on the premise that even admitting the railroad's negligence—

> "That Mr. Couch would choose to do the work in such a manner could not reasonably have been foreseen by the railroad." (A-13)

This is the language of common law proximate causation condemned in the *Rogers* decision.

> "That is the language of proximate causation which makes a jury question dependent upon whether the jury may find that the defendant's negligence was the sole, efficient, producing cause of injury."
>
> *Rogers* v. *Missouri Pacific Railroad Co.*, supra, at p. 506.

Justice White was careful to point out in the court's opinion contained in *Gallick* v. *Baltimore and Ohio Railroad Company*, 372 U.S. 108, 83 S.Ct. 659, 9 L.Ed.2d 618, that—

> "- - - Reasonable foreseeability of harm is an essential ingredient of Federal Employers Liability Act negligence. (citations) But this requirement has been satisfied in the present case *by the jury's findings of negligence in maintaining the filthy pool of water.* Thus, when the jury found these facts - - - it is clear that the jury concluded that respondent should have realized the *increased likelihood of an insect biting petitioner while he was working in the vicinity of the pool.*"

Similarly, in *Ferguson* v. *Moore-McCormack Lines*, 352 U.S. 521, 77 S.Ct. 457, 1 L.Ed.2d 511, the respondent argued that it was not reasonably foreseeable that petitioner would utilize a knife to loosen the ice cream. The court held:

> "- - - the jury - - - could conclude that petitioner had been furnished no safe tool to perform his task. *It was not necessary that respondent be in a position to foresee the exact chain of circumstances which actually led to the accident.*"

This court has condemned a state court appellate tribunal for substituting its judgment for that of a jury.

> "It (Appellate Court) could not properly substitute its judgment for that of the jury and decide as the Supreme Court of Utah did here that 'it seems quite inescapable that it was (petitioner's) own conduct - - - that resulted in his regrettable injury.' "

Dennis v. *Denver & Rio Grande Western Railroad Co.*, 375 U.S. 208, 84 S.Ct. 291, 11 L.Ed. 2d 256.

The opinion of the lower court can only be read to stand for the proposition that—

> "The risk of injury from overlifting, overstraining or overexerting oneself in an employment is a risk assumed by the employee who is a much better judge of his own strength than the employer."
>
> 35 Am.Jur., Sec. 299, p. 723.

This common law fiction cannot be engrafted by implication onto a statutory cause of action provided by the Federal Employers Liability Act. On the contrary, cases tried under the federal act are to be handled as though "*no doctrine of assumption of risk ever existed.*" *Tiller* v. *Atlantic Coast Line Railroad*, 318 U.S. 54, 63 S.Ct. 444, 87 L.Ed. 610.

Justice Black, in *Tiller*, another cornerstone decision under the Federal Employers Liability Act, traced the historical development of the law under the Act. In his perceptive treatment of the subject he noted—

> "In the disposition of cases like plaintiff's, assumption of risk has frequently been treated simply as another way of appraising defendant's negligence."

In *Tiller*, the lower court stated:

> "Congress did not intend to enlarge the obligation of carriers to look out for the safety of their men when exposed to the ordinary risks of the business—."

Under such an interpretation of the Federal Employers Liability Act, the judiciary is placed in the role of determining, presumably by reason of its greater wisdom, factual issues wherein ordinary risks are distinguished from

unusual risks in the operation of a railroad. Justice Black made it clear in *Tiller* that such a result was not intended by Congress.

The Court's opinion in this case cannot be reconciled with the opinions and constitutional views of prior members of this Court, including Justice Black. Chief Justice Burger has attested to Justice Black's prolific and erudite contributions of this Court, stating:

> "Throughout his entire life he never wavered in his unbounded faith in the people and in the political processes of a free people under the American Constitution. He loved this court as an institution and *contributed mightily to its work, to its strength, and to its future.*"
>
> Speech by Chief Justice Burger, Oct. 4, 1971.

Petitioner submits that the 7th Amendment guarantees the right of trial by jury. Justice Black's past contribution to the law of the Federal Employers Liability Act should be respected and applied in this case.

CONCLUSION

To leave standing the lower court's opinion in this case is to adopt the view of dissenters in prior landmark cases under the Federal Employers Liability Act. As one dissenter stated:

> "This is a run of the mill negligence case, presenting no new question of law or departure from established legal principles. The only question is whether there was enough evidence to take the case to the jury.
>
> "A total of 12 New York judges - - - have held that the evidence was not sufficient to warrant submission of the case to the jury. To bring such a case here for

> further review by nine more justices seems to be a most futile expenditure of judicial time."
>
> *Basham* v. *Pennsylvania Railroad*, 372 U.S. 699, 83 S.Ct. 965, 10 L.Ed.2d 80, Dissenting Opinion.

To categorize an action under the Federal Employers Liability Act as a "run of the mill negligence case" has been repeatedly held to be erroneous by this Court. Common law concepts of negligence blend negligence and assumption of risk. When Congress removed assumption of risk from the Act, it intended that cases tried under the Act should be uniformly handled as if no doctrine of assumption of risk had ever existed.

Petitioner is not unmindful of the heavy burden of litigation being imposed on this Court. Numerous cases involving state court misdemeanor convictions have occupied the valuable time of this Court. Petitioner submits that the judicial process whereby a litigant is deprived a valuable property right, to-wit, $60,000, by a state court construing federal law, should likewise be worthy of review by this Court.

Wherefore, petitioner respectfully prays that the Court grant certiorari and reverse the judgment of the Oklahoma Court.

Respectfully submitted,

R. KAY MATTHEWS
Atoka, Oklahoma 74525
JAMES E. DRISCOLL
Seminole, Oklahoma 74868
PAYNE RATNER
444 N. Market
P.O. Box 306
Wichita, Kansas 67201
Counsel for Petitioner

CERTIFICATE OF SERVICE

The undersigned does hereby certify that true copies of the foregoing petition for rehearing were deposited in the United States Post Office with air-mail postage prepaid, addressed to Rainey, Flynn, Welch, Wallace, Ross & Cooper, 735 First National Building, Oklahoma City, Oklahoma; Joseph G. Ralls, 105-1/2 N. Penn, Atoka, Oklahoma, and Lloyd W. Jones, 6703 Del Norte, Dallas, Texas.

This 26th day of January, 1972.

PAYNE RATNER

CERTIFICATE OF COUNSEL

The undersigned counsel, one of the counsel of record for petitioner, certifies that the foregoing Petition for Rehearing is presented in good faith, not for delay, and is restricted to the grounds specified in Rule 58(2) of the Rules of the Supreme Court of the United States.

PAYNE RATNER
444 N. Market
P.O. Box 306
Wichita, Kansas 67201